IN THE HIGH COURT OF GUJARAT AT AHMEDABAD
FIRST APPEAL No 1168 of 1986
with
FIRST APPEAL NO.1169 OF 1986

For Approval and Signature:

Hon'ble MR.JUSTICE M.H.KADRI
and
Hon'ble MR.JUSTICE C.K.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

NEW INDIA ASSURANCE CO.LTD.
Versus
HANSRAJBHAI JIVRAM PATEL

Appearance:
FIRST APPEAL NO.1168/86
MR RAJNI H MEHTA for Petitioner
MR RR TRIVEDI for Respondent No. 1
MR MD PANDYA for Respondent No. 2
NOTICE SERVED for Respondent No. 6, 7, 8, 9

FIRST APPEAL NO.1169/86
MR RAJNI H MEHTA for Petitioner
MR PK JANI for Respondent No. 1
MR MD PANDYA for Respondent No. 2
MR HARDIK C. RAWAL for respondent No.3
NOTICE SERVED for Respondent No. 4 and 5

CORAM : MR.JUSTICE M.H.KADRI
and
MR.JUSTICE C.K.BUCH
Date of decision: 02/05/2000

C.A.V. JUDGMENT : (Per: Kadri, J.)

1. Appellant, the New India Assurance Company Limited, by filing these two appeals, under Section 110-D of the Motor Vehicles Act, 1939 ('Act' for short), has challenged common judgment and award dated December 9, 1986, passed by the Motor Accidents Claims Tribunal (Main), Mehsana, in M.A.C. Petition Nos.391 of 1982 and 519 of 1982, so far as their liability to pay compensation to the original claimants. As common question of facts and law arise for our consideration, we propose to dispose of all these appeals by this common order.

2. On March 2, 1982, deceased Chandubhai Hansrajbhai and applicant of M.A.C.Petition No.519 of 1982, Gangaram Dosjibhai Suthar, were travelling in Metador No.GTE 4260 and were proceeding towards Shihori for supply of goods. Said Metador Van was being driven by the driver Bachubhai. At about 1.45 p.m, when the Matador was near Saraswati Dam, situated on Patan-Deesa Road, a S.T. Bus bearing Registration No.GRT 9995, driven by the driver, Divyakumar Mahipatlal Jani, came from opposite side. The driver was driving the bus very fast and was rash and negligent in driving the bus and both the vehicles came near each other. The driver took the S.T. bus on the wrong side. To avoid a collision, the driver of the Metador took his vehicle on the left side of the road as a result of which both vehicles dashed with each other, and there was heavy impact. Due to the accident, deceased Chandubhai received fatal injuries and succumbed to death on the spot. Applicant, Gangaram Dosjibhai Suthar, sustained injuries on his right shoulder. Widow, minor son, Ishwar, and sister of deceased Chandubhai filed M.A.C.Petition No.391 of 1982 claiming compensation of Rs.1,97,000/- for untimely death of Chandubhai. Applicant, injured Gangaram Dosjibhai Suthar, filed M.A.C.Petition No.519 of 1982 claiming compensation of Rs.25,000/- for the injuries sustained by him during course of the accident.

3. Both the petitions were contested by the S.T. Corporation and its driver by filing their reply at Exh.25 in M.A.C. No.391 of 1992 and Exh.21 in M.A.C.Petition No.519 of 1982. Appellant, the New Indian Assurance Company Limited, filed its written statement at Exh.21 in M.A.C. Petition No. 391 of 1992 and Exh.23 in M.A.C.Petition No.519 of 1982, inter alia, contending that the Insurance Company is not liable to satisfy

award, as deceased Chandubhai and applicant, Gangaram, were travelling in the Metador as 'gratuitous passengers' for which no risk was required to be covered under the policy. It was contended that Metador was carrying passengers against terms and conditions of the policy and, therefore, the Insurance Company was not liable to pay compensation to the claimants.

4. The Tribunal, on the basis of rival contentions raised by the parties, raised issues at Exh.34 in M.A.C.P No.391 of 1981 and at Exh.29 in M.A.C.P. No. 519 of 1982. On overall appreciation of evidence produced by the parties, the Tribunal came to the conclusion that the driver of the Metador bearing GTE 4260 was solely negligent in causing accident in question. On question of negligence, the Tribunal exonerated the driver of the S.T. Bus. The Tribunal, on appreciation of oral as well as documentary evidence, awarded compensation of Rs.1,01,000 to the claimants of M.A.C.Petition No.391 of 1982 to be recovered from the driver, the owner and the Insurance Company of Metador No.GTE 4260. To the claimant, Gangaram, of M.A.C.P No.519 of 1982, the Tribunal awarded compensation in the sum of Rs.18,872/to be recovered from the driver, the owner and the Insurance Company of Metador, GRE 4260. The Insurance Company has challenged both the awards so far as their liability to indemnify the insured, i.e. the owner of Metador GTE 4260. It may be stated that, so far as question of negligence and quantum of compensation is concerned, no appeals are filed challenging those findings and, therefore, we have to only decide the question whether the appellant-Insurance Company is liable to pay compensation or liable to indemnify insured, owner of Metador GTE 4260. It is an admitted fact that on March 2, 1982, deceased Chandubhai and applicant Gangaram were travelling in Metador bearing registration No.GTE 4260 along with goods and the finding of the Tribunal that deceased Chandubhai and applicant Gangaram were traveling along with their goods by paying fare in the said Metador is not challenged by the heirs of deceased Chandubhai and applicant Gangaram by filing any appeal in this Court.

5. Learned counsel for the appellant-Insurance Company has vehemently submitted that the claimants were travelling in the goods vehicle, namely, Matador bearing No.GTE 4260, along with their goods by paying fare which was clearly in breach of policy issued to the insured under Section 95 of the Act. It is submitted that the policy did not cover the risk of passengers, who were carried in the goods vehicle along with their goods by

taking fare. It was submitted that, if the passengers were carried in a goods vehicle by charging fare, it was clearly in breach of the terms of the policy and permit issued to the owner of the goods vehicle and, therefore, the Insurance Company was not liable to indemnify the insured. Learned counsel for the appellant further submitted that, admittedly, the claimants were traveling in the goods vehicle by paying fare along with their goods and, therefore, the present case is squarely covered by the decision of the Supreme Court in the case of Smt. Mallawwa vs. The Oriental Insurance Company Limited & Others, reported in JT 1998 (8) SC 217. Before the Apex Court in a group of matters being C.As. Nos. 1478/87, 6001/90, 6002/90, 2098/96, 5872/94, SLP (C) Nos. 10745, 19747 and 10748/95, the deceased were travelling in goods vehicle as passengers who had succumbed to injuries, prior to introduction of Motor Vehicles Act, 1988. Therefore, the facts of the present case are similar to the facts of those cases before the Supreme Court. It may be mentioned that in these appeals also as the accident had taken place on March 2, 1982, and, therefore, Motor Vehicles Act, 1939 shall be applicable. The Supreme Court, after considering the provisions of Section 95 of the Act, concluded that the owner of a goods vehicle cannot claim indemnification from the insurer in case the goods vehicle had carried passenger by taking fare. This would perhaps robe the third proviso dealing with the contractual liability lame. In view of the pronouncement of the Supreme Court in the case of Smt. Mallawwa (supra) a passenger who, by paying fare, is carried in a goods vehicle will not be covered under the policy issued under Section 95 of the Act. Therefore, the appellant-Insurance Company shall have to be exonerated from the payment of compensation awarded by the Tribunal.

6. Learned advocate for the original claimants vehemently submitted that there was no evidence produced before the Tribunal to show that there was a systematic carrying of passengers in goods vehicle. It is submitted that only if the vehicle is so used often, then that vehicle can be said to be a vehicle in which passengers are carried for hire. If the submission of the learned advocate for the original claimants is accepted, then the whole object of the Act and particularly section 95 would be frustrated. No doubt, the Act is a beneficial legislation and one would normally prefer a liberal interpretation, but the question which arises, is whether without paying extra premium, the owner of the vehicle can claim indemnification from the insurer after taking fare from passengers which is in clear breach of terms of

the policy. If the argument of the learned advocate for the original claimants is accepted, then hardly there would be any evidence before the Tribunal that the vehicle was systematically and habitually used for carrying passengers for hire. That would lead to a disastrous situation. The Supreme Court in Smt. Mallawwa's case (supra) observed as under:

"Thus, to find out whether an insurer would be liable to indemnify an owner of a goods vehicle in a case of the present nature, the mere fact that the passenger was carried for hire or reward would not be enough, it shall have to be found out as to whether he was the owner of the goods or an employee or such an owner, and then whether there were more than six persons in all in the goods vehicle and whether the goods vehicle was being habitually used to carry passengers. The position would thus become very uncertain and would vary from case to case. Production of such result would not be conducive to the advancement or the object sought to be achieved by requiring a compulsory insurance policy."

7. The Apex Court, in Smt. Mallawwa's case (supra) had approved the observations made in the decision of the Orissa High Court in the case of New India Assurance Company v. Kanchan Bewa & Others, (1994 ACJ 138) that "there is another aspect of the matter which has led us to differ from the Full Bench decision of Rajasthan High Court. The same is what finds place in sub-section (2) of Section 95. That sub-section specifies the limits of liability and clause (a) deals with goods vehicle; and in so far as the person travelling in goods vehicle is concerned, it has confined the liability to the employees only. This is an indicator, and almost a sure indicator, of the fact that legislature did not have in mind carrying of either the hirer of the vehicle or his employee in the goods vehicle, otherwise, clause (a) would have provided a limit of liability regarding such persons also."

8. After quoting the above observation of the Full Bench of Orissa High Court, the Apex Court held that "though a conclusion was arrived at after taking into consideration the Orissa Motor Vehicle Rules, in our opinion, the said view is correct, even otherwise also, in view of what we have said, the contrary view expressed by other High Courts has to be regarded as incorrect".

9. Thus, the legal position is clear that the Legislature did not permit carrying of passengers in a goods vehicle by paying fare, otherwise, clause (1) of

Section 95(2) would have provided a limit of liability regarding such persons also. In the present appeals, the claimants were carried as passengers in the goods vehicle along with their goods by charging fare which was not covered by the Insurance Company issued under Section 95 of the Act. In view of the pronouncement of the Apex Court in the case of Sat. Mallawwa (supra), the insurance company cannot be held liable to indemnify the insured to pay compensation. Therefore, the insurance company shall have to be exonerated from liability of paying any compensation to the claimants of both the appeals.

10. In this view of the matter, in the facts and circumstances of this case, when it is clearly established on record that the Metador was meant only for carrying goods, it had no system of carrying the passengers for hire or reward. Even otherwise the touchstone would be as to whether it was permissible for the vehicle in question to carry the passengers and therefore whether they are carried on hire or reward or even if by way of gratis as gracious passenger would not make any difference. In such cases, there is no question of insurance cover to the passengers. The insurance cover is in respect of the vehicle or the goods contained therein, but the insurance cover cannot be extended to the passengers who board a goods carrier or are allowed to board the goods carrier for hire or reward or even on gratis. The insurance cover in such cases can be made available to the employees who are required for the purpose of taking such vehicle. Neither the driver nor the employees who are in fact carrying the vehicle are authorised to allow any passenger to board such vehicle and then thereafter in case of accident, to hold the Insurance Company liable for the payment. If the driver or any of the employees of the owner of the vehicle do so and allow any passenger to board such vehicle, travel thereon, they do so at their own risk and the Insurance Company cannot be held liable for payment of any compensation to such passengers who are unauthorised and right from the inception when they start travelling in such vehicle. The focus is as to what is the class for which the vehicle is registered. If the vehicle is registered only for carrying goods, and not for carrying passengers and yet the passengers are allowed to travel in such vehicles, they cannot seek protection of the umbrella of the insurance so as to get the compensation.

11. As a result of the foregoing discussion, both the appeals are allowed. The common judgment and award dated December 9, 1986, passed by the Motor Accidents Claims

Tribunal (Main), Mehsana, in M.A.C. Petition Nos.391 of 1982 and 519 of 1982, qua the appellant, is quashed and set aside and the appellant-Insurance Company is exonerated from liability to pay compensation to the original claimants. The common judgment and award dated December 9, 1986, passed by the Motor Accidents Claims Tribunal (Main), Mehsana, in M.A.C. Petition Nos.391 of 1982 and 519 of 1982 is modified to the extent that the compensation awarded to the claimants of both the claim petitions shall be paid by the driver and the owner of Metador GTE 4260 jointly and severally with interest and proportionate costs of the claim petitions. The appeals, are, therefore, allowed accordingly.

12. At this stage, learned counsel for the claimants of M.A.C.P. No.519 of 1982, namely, Gangaram, has vehemently submitted that the claimant, Gangaram, pursuant to the order of this Court, had withdrawn the amount deposited by the Insurance Company in the Tribunal and, therefore, the claimant should not be directed to redeposit the amount withdrawn by him. In support of above submission, learned counsel for the claimant, Gangaram, relied upon the observation of the Supreme Court in the case of National Insurance Company Limited vs. Nathilal and others, reported in (1999) 1 SCC 552. In the above case, the Supreme Court, in paragraph 9, has observed as under:

"9. This Court, by an order dated 24.10.1994, while granting interim stay, directed the appellant-Insurance Company to deposit the entire award money in the Tribunal. It further permitted the claimant to withdraw a sum of Rs.50,000/- out of such deposit. The balance amount was directed to be invested in a long-term deposit in a scheduled bank. The appellant-Insurance Company is permitted to withdraw the amount in deposit with accrued interest in view of its success in this appeal. The amount paid to the claimant, pursuant to the order of this Court, shall not be recovered from the claimant, but the appellant can recover that amount from the owner of the vehicle."

In view of the pronouncement of the Supreme Court in Nathilal's case (supra), in our opinion, the amount which is withdrawn by the claimant, Gangaram, pursuant to the order of this Court, shall not be recovered from the claimant but the appellant can recover said amount from the owner of the vehicle, i.e. Metador GTE 4260. The appellant-Insurance Company had already deposited amount of compensation awarded to the heirs and legal representative of deceased Chandubhai in the Tribunal. It is reported that the said amount was not invested till today by the Tribunal as the original claimants had not

appeared before the Tribunal for withdrawal or disbursement or investment of the amount deposited by the Insurance Company. We direct that the amount of costs deposited by the appellant-insurance Company shall be paid over to applicant no.4 of M.A.C.P. No.391 of 1982, Parvati Hansrajbhai Patel, who was sister of deceased Chandubhai. The appellant-insurance Company shall be entitled to withdraw the rest of the amount deposited by it in the Tribunal pursuant to the order of this Court. The office is directed to draw decree in terms of this judgment. The order of disbursement and investment passed by the Tribunal in both the claim petitions in favour of the claimants is hereby not disturbed and confirmed. The impugned award be modified in terms of this judgment. There shall be no order as to costs.

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(swamy)